SECTION OF FAMILY LAW
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ENEWSLETTER NEWSLETTER

## Best of ListServ

***Q:*** *I have been contacted by a military member on active duty in the US. He was a resident of NH just before he joined the military and he would like to file for divorce in NH because we do not require any separation, legal or otherwise, before filing.*

*Where can I find the applicable law on this? Many thanks.*

**A:** First look to your relevant state statute. In Ohio, Revised Code section 3105.03, the word "residence" had been construed to mean "domiciliary residence," which is comprised of two components" "(1) an actual residence in the jurisdiction, and (2) an intention to make the state of jurisdiction a permanent home." Hager v. Hager, 79 Ohio App. 3d 239 (1992). The Ohio Appellate Court distinguished "domicile" from "residence" as follows: " 'domicile' ordinarily has a broader meaning than residence. Domicile conveys a fixed, permanent home. It is the place to which one intends to return and from which one has no present purpose to depart.A party's domicile generally coincides with his place of residence. However, while an individual may have several residences, he can be domiciled in only one place at a given time.It is plaintiff's burden to show that he is domiciled in the state....by a preponderance of the evidence.The fact of residence in a location is prima facie evidence of domicile there, but is rebuttable by proof to the contrary.However, an intention to make a permanent home is known only by the individual concerned and is, therefore, largely a subjective determination.The word 'residence' imports an actual physical presence within the state. It signifies an abode or place of dwelling." One may maintain a domicile in a particular state, while maintaining a residence elsewhere. This is more often than not the case with military members.

Military members must complete a "State of Legal Residence Certificate" and designate a state as their legal residence or domicile. This certificate is required by the Tax Reform act of 1976, Public Law 94-455 to determine the correct state of residence for withholding state income taxes from military pay. The designation made in this certificate is not conclusive as to the state court's determination of the litigant's domicile because it is simply the military member's representation to the armed forces of what state he wants to treat as his residence for state tax withholding purposes. Thus, in the Hager case, the court held that the fact that the Air Force member had designated Florida on his residence certificate, did not end the analysis. The fact that the plaintiff testified that he intended to make Ohio his permanent home, that he intended to marry an Ohio resident and live with her here, that he was near retirement and intended to seek civilian employment here, and that he had brought a home here, all combined to demonstrate his intention to domicile in Ohio. The fact that he had changed his residence certificate, voter registration and driver license registration from Florida to Ohio one month before filing for divorce did not negate the finding of domicile in Ohio.

Second, determine whether you need in rem or in personam jurisdiction. If all your client wants

is a divorce, his domicile in NH is sufficient to grant the court jurisdiction to terminate the marriage and to make orders regarding property located in the state. A decree of divorce or legal separation is regarded as a judgment in rem because it determines the marital status or res of the parties. See Williams v. North Carolina (1942) 317 U.S. 287.

If your client seeks orders related to support, custody and division of property located outside the state in which he files, he will need to make sure that his spouse has had "minimum contacts" under the Due Process clause of the Fourteenth Amendment and as defined by NH's long arm statute, so as to obtain personal jurisdiction over her. See Kulko v. Superior Court of California (1978) 436 U.S. 84., which applied the "minimum contacts " test of International Shoe Co. v. Washington (1945), 326 U.S. 310, and the "purposeful availment" test of Hanson v. Denckla (1958) 357 U.S. 235.

Dalma Grandjean

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***Q:*** *I have filed a divorce case for the wife based on her residence in Maine. No other basis for jurisdiction exists as parties never lived here nor were they married here. I assumed that I would not have in personam jurisdiction over the husband and therefore an order like spousal support would not be valid. We were not claiming spousal support anyway. But I also assumed that orders on equitable property distribution would be valid, even for property in another state. Husband was personally served and has counsel who filed a limited appearance and is moving to dismiss based on lack of jurisdiction.*

*Anybody have any citable cases? Thanks,*

**A:** A decree dissolving a marriage is considered a determination of status, and does not require personal jurisdiction over both spouses. If one spouse meets residency requirements, that spouse can get a decree of divorce without regarding to the jurisdiction of the court over the other spouse. The same is true of custody and visitation or time-sharing issues, as that is a determination regarding children based on your status as a parent. So long as UCCJEA (or UCCJA) requirements are met for subject matter jurisdiction, personal jurisdiction over both parents is not required.

An order for child support, support alimony or division of property is not considered a status-based determination, but a judgment which is personal to the obligee. That is why the court must have jurisdiction over both the subject matter and person of the Defendant or Respondent to enter a valid order. You must be able to establish sufficient minimum contacts with the forum state so that fundamental notions of fair play and substantial justice are satisfied.

If there are no minor children, and there are not sufficient minimum contacts with Maine so as to confer personal jurisdiction of the court over the Defendant or Respondent, all you can obtain is a bare divorce.

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***Q:*** *I have a client who is in the midst of a divorce. She is in her 50's and has had a stroke, lives in a nursing home, might move to live with her son.*
*She has been getting spousal support, modifiable, but now hubby has lost his job and wants a*

*reduction.*

*Does anyone on this list know how much of her support she can "keep" before it either goes to the Feds or reduces her benefits? She is on Medicaid. Will it matter if she is in a nursing home or a family home?*

**A:** Upon divorce, she can have no more than $2,000 plus a $45/mo personal needs allowance, plus exempt assets to remain eligible for Medicaid.

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This months "Litigation News" of the ABA Section of Litigation, details a family law attorney who was charged with violating the Americans with Disabilities Act by not providing his deaf client with a "qualified interpreter" and instead using (i) her sister to act as interpreter into sign language; and (ii) letters and faxes to communicate with her. The DOJ claimed that an attorney in private practice qualifies as a "place of public accomodation" under the ADA and the family law lawyer should have provided a qualified interpreter at no charge to her. According to the article, the attorney consented to a single violation of the ADA, agreed to reimburse his client $2,200 and forego collection of his fees, and place a notice in his local newspaper stating that he is in compliance with the ADA and welcomes clients with disabilities.

For more information, see Settlement Agreement Between the United States of America and Gregg M. Tirone, Complaint No. 202-53-20 (Jan. 5, 2004), www.usdoj.gov/crt/ada/tirone.htm.

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